for an increased punishment. The increased punishment is given because the second offender is guilty of a greater criminal act. And it would seem that a man who offends for a second time after having received a pardon for his first offense, thereby demonstrates that his degree of criminality is—at least—fully equal to that of a man who has never been favored with the indulgence of the Executive. J. M. H.

WHAT CIRCUMSTANCES WILL RAISE A PRESUMPTION OF UNDUE INFLUENCE IN THE EXECUTION OF A WILL.—The Court of Appeals of New York and the Supreme Court of Iowa have recently handed down decisions in which the courts take opposing views as to the shifting of the burden of proof in cases of alleged undue influence in the execution of wills. In the New York case, the contestant showed that the principal residuary legatee was the attorney who drew the instrument. The Court of Appeals held that this did not raise a presumption of undue influence, and that the burden of proof remained on the contestant. *In re Kindberg's Will,* 100 N. E. 789. In the Iowa case it was shown that the will made large provision for decedent's physician and that he had been instrumental in having it drawn; it was held that the circumstances raised a presumption of undue influence. *Cash* v. *Dennis,* 139 N. W. 920.

In probating a will the burden of proof is on the proponent to establish that it is the will of the deceased. Various presumptions arise, however, which shift the burden of proceeding: when the proponent has shown the due execution of the will and the death of the maker, he has established a *prima facie* case; the burden is then on the contestant to establish affirmatively the grounds on which it should be declared that the will offered is not the will of the decedent. So far all the courts are substantially agreed. But some authorities maintain that when the contestant has shown a large gift to a certain person and the existence of a fiduciary relation between such person and the decedent, e. g. attorney and client, physician and patient, guardian and ward, priest and communicant, that such establishes a *prima facie* case against the will and places the burden as to that issue upon the proponent. *Jones* v. *Roberts,* 37 Mo. App. 163; *Bridwell* v. *Shank,* 84 Mo. 455, 467; *Maddox* v. *Maddox,* 114 Mo. 35; WOERNER, AM. ADM. § 32.

Equity, since earliest times, (*Scribblehill* v. *Brett,* 1 Brown Cas. Pal. 57) by an unbroken current of authority has held that as regards transactions *inter vivos,* any fiduciary relation raises a presumption of undue influence and the one who asserts such invalidity has merely to show such relation to establish a *prima facie* case.

Many cases contain statements which might lead one to conclude that the same rule has generally been applied to wills, but such is not the case. There are very few courts which hold that mere fiduciary relationship establishes such a presumption. The relationship is always accompanied by some attendant circumstance as that the same person also drew the will or procured it to be drawn, gave directions as to its contents to a draughts-

man, selected the witnesses to be present and the like. One or more of such conditions are present in very nearly all of the cases cited *supra* by WOERNER as authority for his statement of the rule. In fact *Bridwell* v. *Shank* and *Jones* v. *Roberts* there cited by him seem to be the only cases directly in point.

There are many substantial reasons for a different rule as regards wills from that applied to transactions *inter vivos,* and these are well stated by MCCLELLEN, J., in *Bancroft* v. *Otis,* 91 Ala. 279, which has been extensively cited, quoted and followed: "The doctrine of presumed undue influence against the dominant party in transactions *inter vivos* proceeds primarily upon the natural assumption that a living person having, it is supposed, a need for his property or at least a desire to retain it during life, will not part with it without a measureably adequate equivalent. When it is made to appear that he had given it away, and that to one who occupies a position of dominion in relation to him, the presumption is that he has not freely done so but that he was coerced into so doing by undue influence, of the party benefited. But with respect to testamentary dispositions, the primary assumption cannot be made, the donee does not intend any longer to enjoy them; in the natural course of things it must go to some one else and the very considerations which lead to suspicion as to transactions *inter vivos,* friendship, trust and confidence, affections, personal obligations, may and generally do justly and properly, give direction to testamentary dispositions.

"Another very cogent reason for the distinction rests upon the difference in the attitude which is sustained by the donee or grantee on the one hand and the devisee or legatee on the other to the act sought to be impugned. It is one of the leading principles of law in this connection that the burden of proof as to a particular fact is ordinarily upon the party who is in a position to know the truth with respect thereto, and is not, except in certain cases governed by rules which do not obtain here, imposed upon the party who is not supposed to have knowledge in the premises. Transactions *inter vivos* are necessarily transactions *inter partes.* The donee or grantee is present at the time of, or at least knows of and accepts, the donation or grant. He is in a position to know and it is reasonable to require him to explain. These reasons for the rule in respect to transactions *inter vivos* do not obtain with respect to wills. The legatee or devisee may be many miles away when the will is drawn, may not know that a will has been drawn and his act of acceptance may be many years removed from the time of the making of the will."

Another very material distinction is pointed out by Lord PENZANCE in *Parfitt* v. *Lawless,* 2 L. R., P. & D. 462: "The influence which is undue in the cases of gifts *inter vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions, it is considered by the courts of equity that the natural influence which such relations involve exerted by those who possess it to obtain a benefit for themselves is an undue influence. But with regard to wills a natural influence may legally be asserted. The influence which will set aside a will must amount to force and coercion, destroying free agency. It may be reasonable enough

to presume that a person who had obtained a gift or contract to his own advantage and the detriment of another by way of personal advice or persuasion has availed himself of the natural influence which his position gave him; and in casting upon him the burden of exculpation the law is only assuming that he has done so. But it is a very different thing to presume, without a particle of proof, that a person so situated has abused his position by the exercise of dominion or the assertion of adverse control."

Many authorities considering the distinction pointed out by Lord PENZANCE as the vital one hold that the burden never shifts from the contestant, but that proof of a confidential relation is a circumstance of suspicion requiring clear and decisive evidence of the testator's knowledge and assent to the contents of the will. Among these are the New York courts. *Cudney* v. *Cudney*, 68 N. Y. 148; *Matter of Martin*, 98 N. Y. 193; and to the same effect are *Yardley* v. *Cuthbertson*, 108 Pa. St. 395; *Armor's Estate*, 154 Pa. St. 517; *Barry* v. *Butlin*, 1 Curt. 637; *McCommon* v. *McCommon*, 151 Ill. 428; *Parfitt* v. *Lawless, supra; Downey* v. *Murphy*, 1 Dev. & B. (N. C.) 82; *Meek* v. *Perry*, 36 Miss. 190.

But it is submitted that the better rule is that laid down in *Bancrotf* v. *Otis, supra* which is supported by the weight of authority in this country, to the effect that before testamentary dispositions can be presumed to have been unduly influenced, something in addition to the mere existence of a confidential relation must be shown; as that the proponent initiated the preparation of the instrument, wrote it himself, gave directions as to its contents to a draughtsman, or selected the witnesses to be present and the like. *St. Leger's Will*, 34 Conn. 434; *Henry* v. *Hall*, 106 Ala. 84; *In re Brook's Estate*, 54 Cal. 471; *Goodbar* v. *Lidiky*, 136 Ind. 1; *Denning* v. *Butcher*, 91 Ia. 425; *Sechrest* v. *Edwards*, 61 Ky. 163; *McMaster* v. *Scriven*, 85 Wis. 162; *Bennett* v. *Bennett*, 50 N. J. Eq. 439; *Watterson* v. *Watterson*, 1 Head 1; *Paxton* v. *Allison*, 7 Humph. 332; and see the following New York cases, *In re Welsh*, 1 Redf. 238; *Matter of Smith*, 95 N. Y. 516. Such is the rule laid down in the Iowa case. P. B.

SETTING ASIDE DEFAULT JUDGMENTS.—An extremely interesting case, decided by a divided court, two to one, has recently been handed down by the Supreme Court of Montana. In *Lovell* v. *Willis* (1913), 129 Pac. 1052, the plaintiff sued for the value of services rendered. The defendant was regularly served, but defaulted, and upon application the clerk by virtue of statute entered judgment for the amount specified in the complaint. Two days later the defendant moved to set aside the default and vacate the judgment on the ground that he had failed to appear "by reason of his mistake, inadvertance, and excusable neglect." The motion was accompanied by an affidavit setting out the facts upon which he would rely for his defence if allowed to answer. It appeared therefrom that when served, after reading a copy of the complaint, defendant placed it in a valise and then forgot about it, as he was traveling and "his attention was so absorbed by his devotion to important domestic and business duties, besides matters of public interest,"